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7 **UNITED STATES DISTRICT COURT**  
8 **FOR THE EASTERN DISTRICT OF MICHIGAN**

9 HARSHADBHAI PATEL and DIPTI  
10 PATEL,

11 Plaintiffs,

12 vs.

13 JANET NAPOLITANO, Secretary  
14 of Homeland Security, MICHAEL  
15 AYLES, Acting Deputy Director,  
16 United States Citizenship and  
17 Immigration Services, F. GERARD  
18 HEINAUER, Director of the  
19 United States Citizenship and  
20 Immigration Services' Nebraska  
21 Service Center and VINCENT  
22 CLAUSEN, Detroit Field Office  
23 Director for the Immigration and  
24 Customs Enforcement Agency

25 Defendants

MOTION FOR TEMPORARY  
RESTRAINING ORDER STAYING  
THE OF REMOVAL OF  
HARSHADBHAI PATEL

Case No. 2:09-cv-13018

MOTION FOR TEMPORARY ORDER STAYING  
THE REMOVAL OF HARSHADBHAI PATEL - 1

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**MOTION FOR TEMPORARY RESTRAINING ORDER STAYING  
THE REMOVAL OF HARSHADBHAI PATEL**

Harshadbhai Patel, through his attorneys, moves this Court pursuant to FRCP 65(b) and 28 U.S.C. § 1651, the “All Writs Act”<sup>1</sup>, to issue an immediate order restraining the Department of Homeland Security from removing him during the pendency of this action. This is an action in the nature of mandamus to direct the USCIS to adjudicate Mr. Patel and his wife’s applications for adjustment of status<sup>2</sup>, form I-485, as well as Mrs. Patel’s employer’s immigrant visa petition upon her behalf, form I-140. Mr. Patel’s removal would be deemed an abandonment of his application. 8 C.F.R. § 245.2(a)(4)(ii)(A). The All Writs Act must be “directed at conduct which, left unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to a natural conclusion.” *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5<sup>th</sup> Cir.1978)(footnote omitted). Since Mr. Patel’s removal would in fact eliminate any power of this Court to bring this litigation to a conclusion on any basis except a dismissal for mootness, the issuance of a Temporary Restraining Order

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<sup>1</sup> This Act provides in relevant part that “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a).

<sup>2</sup> As well as his wife’s prospective employer’s petition for immigrant, form I-140, upon her behalf, the approval of which is a necessary precursor to the approval Mrs. Patel’s application for adjustment of status and therefore Mr. Patel’s.

1 prohibiting Mr. Patel's removal from the United States is fully  
2 authorized by the All Writs Act.

3  
4 FRCP 65(b) provides an alternative basis for a temporary  
5 restraining order. In determining whether to issue a temporary  
6 restraining order, a district court must consider four factors,  
7 balancing each factor against the other: (1) the likelihood that the  
8 moving party will succeed on the merits of the claim; (2) the  
9 likelihood the moving party will suffer irreparable injury if  
10 injunctive relief is not granted; (3) whether granting the relief will  
11 cause substantial harm to others; and (4) whether granting the  
12 relief would serve the public interest. *Suster v. Marshall*, 149 F.3d  
13 523, 528 (6th Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999);  
14 *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994). As the  
15 Sixth Circuit has held, however, the four considerations are factors  
16 to be balanced, not prerequisites that must be met. *In re: DeLorean*  
17 *Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985). Therefore, the  
18 degree of likelihood of success required to support a grant of  
19 injunctive relief may depend on the strength of the other factors  
20 considered. *Id.*

21  
22 As we will show, Mr. Patel has a strong likelihood of success  
23 on the merits and will suffer irreparable harm if he is removed. By  
24  
25

1 contrast the government will suffer little or no detriment as a result  
2 of a stay. Therefore an order for stay of removal should issue.

3  
4 A copy of Mr. Patel's complaint and this motion has been  
5 served upon the United States Attorney's office, which is  
6 representing the defendants in this matter, and it is believed that  
7 this is sufficient notice to enable the defendants to be heard.

8  
9 BRIEF STATEMENT OF PERTINENT FACTS

10  
11 Harshadbhai Patel arrived in the United States on August 6,  
12 2001 without a visa and was initially taken into custody.<sup>3</sup> However,  
13 following a finding that he had a credible fear of returning to India,  
14 he was paroled into the United States on August 13, 2001.<sup>4</sup> He was  
15 subsequently ordered removed by an Immigration Judge as a  
16 person without a valid entry document on May 19, 2005.<sup>5</sup> This  
17 order was affirmed by the Board of Immigration Appeals on  
18 December 18, 2006.<sup>6</sup> Thereafter, on January 3, 2007, Mr. Patel  
19 filed with the United States Citizenship and Immigration Services'  
20  
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23  
24 <sup>3</sup> See Notice to Appear attached as Exhibit 1.

25 <sup>4</sup> See Parole document, attached as Exhibit 2.

<sup>5</sup> See Decision of Immigration Judge, attached as Exhibit 3.

(USCIS) Nebraska Service Center (NSC) an application to adjust his immigration status to permanent resident under 8 U.S.C. § 1255(i)<sup>7</sup> as the dependent of his wife, whose application for adjustment of status had been filed with NSC on June 29, 2005.<sup>8</sup> Mrs. Patel's application was based upon a petition for immigrant worker, form I-140<sup>9</sup>, which had been filed by her prospective employer upon her behalf seeking to classify her as a skilled worker on September 29, 2004<sup>10</sup>. The Sixth Circuit Court of Appeals subsequently upheld Mr. Patel's removal order on April 21, 2008<sup>12</sup>.

Meanwhile Mr. Patel's application for adjustment of status continues to remain pending unadjudicated before the USCIS, as does his wife's application and the petition filed upon her behalf by her prospective employer. Since the normal processing time for an

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<sup>6</sup> See Decision of Board of Immigration Appeals attached as Exhibit 8.

<sup>7</sup> See Mr. Patel's Form I-485 and supporting documents and fee receipt, all attached as Exhibit 4.

<sup>8</sup> See Mrs. Dipti Patel's Form I-485 and supporting documents and fee receipt, all attached as Exhibit 5.

<sup>9</sup> See the form I-140 fee receipt, filed upon behalf of Mrs. Patel, attached as Exhibit 6.

<sup>10</sup> The "priority date" of this petition was April 30, 2001, the date her employer filed an application for alien employment certification upon her behalf. 8 C.F.R. § 204.5(d). A copy of that approved application is attached as Exhibit 7.

<sup>12</sup> See Decision of the Sixth Circuit Court of Appeals, attached as Exhibit 9.

1 I-140 for a skilled worker is 4 months, and Mrs. Patel's petition has  
2 been pending for nearly 5 years, it is well beyond normal processing  
3 times. So too are Mr. and Mrs. Patel's forms I-485, inasmuch as the  
4 NSC is currently adjudicating employment based forms I-485 it  
5 received on September 8, 2007.<sup>13</sup>  
6

7 On July 27, 2009 Mr. Patel was arrested by DHS and is  
8 currently being held in Battle Creek, Michigan, in the custody of the  
9 Calhoun County sheriff, facing imminent removal from the United  
10 States.  
11

## 12 ARGUMENT

### 13 14 15 16 *I. MR. PATEL IS LIKELY TO SUCCEED ON THE MERITS OF HIS* 17 *COMPLAINT* 18 19 20

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21 <sup>13</sup> See USCIS Processing Time Information for the Nebraska Service Center  
22 Posted: July 16, 2009, attached as Exhibit 10. The currently available  
23 processing times should be available online at  
<https://egov.uscis.gov/cris/processTimesDisplay.do>.

24 <sup>15</sup> Had the NSC processed the Patels' applications and petitions within the  
25 same time frames it is currently deciding such matters, Mrs. Patel's I-140  
would have been adjudicated by February, 2005, her I-485 by May, 2006, and  
Mr. Patel's I-485 by December, 2007.

1 The Administrative Procedure Act, 5 U.S.C. § 706(1), the  
2 Federal Question statute, 28 U.S.C. § 1331 and the Mandamus Act,  
3 28 U.S.C. § 1361, all provide subject matter jurisdiction for this  
4 Court to require the defendants to conclude plaintiff's application  
5 for adjustment of status (and his wife's petition and application,  
6 upon which it relies) within a reasonable time.  
7  
8

9 Title 28, section 1361 of the United States Code states that  
10 "the district courts shall have original jurisdiction of any  
11 action in the nature of mandamus to compel an officer or  
12 employee of the United States or any agency thereof to perform  
13 a duty owed to the plaintiff." To establish mandamus  
14 jurisdiction, a petitioner must establish that: (1) he has a clear  
15 right to relief; (2) the defendant has a clear, non-discretionary  
16 duty to act; and (3) there is no other adequate remedy  
17 available. *Heckler v. Ringer*, 466 U.S. 602, 616-17, 80 L. Ed.  
18 2d 622, 104 S. Ct. 2013 (1984); *In re Bankers Trust Co.*, 61  
19 F.3d 465, 469 (6th Cir. 1995).

20 *Nelson v. United States*, 107 Fed. Appx. 469, 471 (6th Cir. 2004).

21 5 U.S.C. § 555(b) requires administrative agencies to conclude  
22 all matters before them within a "reasonable time", and 5 U.S.C. §  
23 706(1) authorizes this Court to compel agency action "unreasonably  
24 delayed".  
25

1       The fact that neither the statute nor the regulations quantify  
2 what is a reasonable time in which to decide an application for  
3 adjustment of status simply makes it a question of fact to be  
4 determined under all of the circumstances. As this Court held in  
5 reference to the National Traffic Motor Vehicle Safety Act ‘neither  
6 the statute nor the regulations provide a time frame for deciding  
7 petitions.’ The petition has been pending in this case for over  
8 seventeen months. In the absence of language setting forth a time  
9 frame, the Court looks to the Administrative Procedure Act for  
10 further guidance, which, as noted earlier, authorizes a court to  
11 ‘compel agency action unlawfully withheld or unreasonably  
12 delayed.’ 5 U.S.C. § 706(1). The statutory language implies that an  
13 agency of government is charged with the duty of acting reasonably;  
14 therefore, the Court determines that in the absence of a specific  
15 timetable, the agency has a duty to decide the petition within a  
16 reasonable time.” *Intermodal Technologies., Inc. v. Mineta*, 413 F.  
17 Supp. 2d 834, 842 (D. Mich. 2006).



1       What is a “reasonable time” is certainly a matter to be  
2 determined under all of the applicable circumstances. However, it  
3 should be self-evident that a time which is not only well beyond the  
4 agency’s own normal processing periods for similar applications,  
5 but is so delayed that the application is in imminent peril of being  
6 mooted, is not “within a reasonable time” for the USCIS to conclude  
7 Mr. Patel’s application for adjustment of status, nor his wife’s form  
8 I-140 and I-485. *See Paunescu v. I.N.S.*, 76 F.Supp.2d 896 (N.D.Ill.  
9 1999).

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14       In *Paunescu*, winners of the diversity visa lottery brought an  
15 action in federal court seeking a mandamus order against the  
16 Immigration and Naturalization Service requiring them to complete  
17 the plaintiffs’ applications for adjustment of status to permanent  
18 resident based upon their diversity visa lottery success before it  
19 became mooted by the passage of time, in that the visa numbers for  
20 that category ceased to exist at the end of that fiscal year,  
21 September 30, 1998. The Court ordered the INS to complete  
22 adjudication of the plaintiffs’ applications by that date. Although  
23  
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1 nowhere was it specifically stated as such, it is apparent that the  
2 Court determined that the INS had a duty to the plaintiffs to  
3 adjudicate their applications for adjustment of status before the  
4 passage of time rendered them nonapprovable. The Court's finding  
5 "that defendants owe plaintiffs a non-discretionary duty to complete  
6 the processing of their applications", *Id.*, 76 F.Supp.2d at 903,  
7 necessarily meant that the defendants had a duty to complete that  
8 processing before it was mooted by the passage of time.  
9  
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12

13 By the same token, it should be self-evident that the reasonable  
14 time in which defendant Department of Homeland Security's USCIS  
15 branch has a duty to adjudicate Mr. Patel's form I-485, together  
16 with any necessary prerequisites, is prior to the application being  
17 mooted by the actions of its own Immigration and Customs  
18 Enforcement branch's removal of Mr. Patel, thereby causing him to  
19 abandon his application, 8 C.F.R. § 245.2(a)(4)(ii)(A), and subjecting  
20 him to a ten year bar on re-admission to the U.S. 8 U.S.C. §  
21 1182(a)(9)(A).  
22  
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1 Finally, the Secretary of Homeland Security should not be  
2 permitted to default on her duty to adjudicate Harshadbhai Patel's  
3 application for adjustment of status by the simple expedient of  
4 removing him from the United States, particularly after she has  
5 accepted a premium fee from him under 8 U.S.C. § 1255(i) to  
6 adjudicate his petition despite the fact he was removable.  
7  
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10 This application was filed pursuant to newly promulgated  
11 regulations expressly intended to permit certain "arriving aliens",  
12 such as Mr. Patel to apply for adjustment of status with USCIS even  
13 if they were under removal proceedings or, indeed, even if they had  
14 been ordered removed from the United States. See 71 Fed Reg.  
15 27585, 27591(May 12, 2006). The regulation was adopted by the  
16 Department of Homeland Security in response to a series of judicial  
17 decisions holding that its prior regulatory prohibition preventing  
18 arriving aliens in removal proceedings from applying for adjustment  
19 of status was contrary to the express intent of Congress in enacting  
20 8 U.S.C. § 1255(a) to permit foreign nationals such as Harshadbhai  
21 Patel who were paroled into the United States, from adjusting  
22  
23  
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1 status in this country. See 71 Fed Reg. 27585, 27587(May 12,  
 2 2006), *Scheerer v. U.S. Atty. Gen.*, 445 F.3d 1311 (11th Cir. 2006);  
 3 *Bona v. Gonzales*, 425 F.3d 663 (9th Cir. 2005); *Zheng v. Gonzales*,  
 4 422 F.3d 98 (3d Cir. 2005); *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir.  
 5 2005).

6  
 7  
 8  
 9 Permitting Secretary Napolitano to evade this requirement by  
 10 simply delaying a decision on Mr. Patel's application with her USCIS  
 11 hand whilst she removes him with her Immigration and Customs  
 12 Enforcement hand would be a blatant evasion both of the judicial  
 13 decisions giving rise to said rule and the intention of Congress which  
 14 these decisions vindicated. Such transparent gamesmanship should  
 15 not be tolerated by this Court.  
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18  
 19 *II. MR. PATEL WILL UNQUESTIONABLY SUFFER IRREPARABLE*  
 20 *INJURY IF THE INJUNCTIVE RELIEF IS NOT GRANTED*

21  
 22 As explained above, if Mr. Patel is removed from the United  
 23 States he will be unable to complete his adjustment of status  
 24 application. Nor will he be able to apply for an immigrant visa at a  
 25

1 U.S. consulate after his wife's adjustment is completed, because he  
2 will be barred by the execution of the removal order from returning  
3 to the U.S. for 10 years. Therefore the harm Mr. Patel will suffer by  
4 removal, the loss of U.S. permanent resident status for at least ten  
5 years is, literally, irreparable, in that there is no mechanism for  
6 reimbursing him or otherwise ameliorating his loss if he is removed.  
7  
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10 *III. STAYING MR. PATEL'S REMOVAL WILL NOT CAUSE*  
11 *SUBSTANTIAL HARM TO OTHERS*

12  
13 Granted, there is a DHS and public interest in the prompt  
14 execution of removal orders. However, the DHS's failure to take any  
15 action to remove or even detain Mr. Patel until July 27, 2009,  
16 despite being legally able to do so since the Board of Immigration  
17 Appeals decision upholding his removal order on December 18,  
18 2006, demonstrates the low priority it attaches to his removal and  
19 the lack of a threat he poses to the public at large.  
20  
21  
22

23 Finally, a stay of removal serves the public interest of ensuring  
24 that the DHS complies with the law. *Bejjani v. I.N.S.* 271 F.3d 670,  
25

1 689 (6<sup>th</sup> Cir. 2001). Here this will be impossible if a stay is not  
2 granted since Mr. Patel's removal will moot the instant controversy  
3 as it pertains to him and bring his part of the case to a close  
4 without any finding as to whether the DHS unreasonably delayed  
5 his application for adjustment of status.  
6

7 *IV. JURISDICTION*  
8

9 It is anticipated that the government will challenge this  
10 Court's jurisdiction both to grant Mr. Patel a stay of removal on the  
11 basis of 8 U.S.C. § 1252(g) and to hear this action at all on account  
12 of 8 U.S.C. § 1252(a)(2)(B). As we will now show however, any such  
13 jurisdictional challenges would be misplaced in light of controlling  
14 Sixth Circuit authority.  
15  
16

17  
18 A. THIS COURT HAS JURISDICTION TO STAY REMOVAL OF MR.  
19 PATEL DURING THE PENDENCY OF THIS ACTION DESPITE §  
20 1252(g)

21 As can be seen, the gravamen of Mr. Patel's complaint is that  
22 the USCIS has improperly delayed the adjudication of his and his  
23 wife's applications for adjustment of status as well as her  
24 employer's immigrant visa petition upon her behalf. Accordingly,  
25

1 this Court has jurisdiction to grant him a stay of removal pursuant  
2 to the 6<sup>th</sup> Circuit's decision in *Mustata v. U.S. Dept. of Justice*, 179  
3 F.3d 1017 (6<sup>TH</sup> Cir. 1999), notwithstanding the bar on the review  
4 of the execution of removal orders contain in 8 U.S.C. § 1252(g).  
5

6  
7 In *Mustata*, the petitioners brought a habeas corpus petition  
8 claiming that they had been persuaded to abandon their application  
9 for asylum due to ineffective assistance of counsel. The district  
10 court held that it lacked jurisdiction under 8 U.S.C. § 1252(g) to  
11 grant the petitioners a stay of removal and the Sixth Circuit  
12 reversed. The Court of Appeals carefully analyzed the Supreme  
13 Court's decision in *Reno v. American Arab Anti-Discrimination*  
14 *Committee, Inc.*, 525 U.S. 471 (1999), and the three discreet actions  
15 with which § 1252(g) prescribed judicial interference. The Court  
16 concluded that none of these prohibitions were applicable to the  
17 petitioners' case. In particular, it found that the petitioners' action  
18 was not one to review the Attorney General's decision or action to  
19 execute a removal order because:  
20  
21  
22  
23

24 The facts relevant to their claim - essentially that their counsel  
25 failed to investigate and present relevant evidence - took place

1 well before any decision by the Attorney General to execute a  
2 removal order. Moreover, the Mustatas are not claiming that  
3 the Attorney General should grant them discretionary,  
4 deferred-action-type relief. That is, they are not asking the  
5 Attorney General to exercise her discretion to allow them to  
6 remain in the United States. The fact that the Mustatas in  
7 their petition seek a stay of deportation does not make their  
8 claim one against the decision to execute a removal order. The  
9 substance of their claim is that their counsel's failure to

10 investigate and present relevant evidence resulted in a  
11 violation of their due process rights. Whether or not the  
12 Attorney General executes a removal order against the  
13 Mustatas is immaterial to the substance of this claim.  
14 Respondents' argument to the contrary confuses the  
15 substance of the Mustatas' claim with the remedy requested.

16 *Mustata*, 179 F.3d 1022-23.

17 Here the USCIS's failure to adjudicate Mr. Patel's and his  
18 wife's applications for adjustment of status and his wife's immigrant  
19 visa petition began well before any decision by the Secretary of  
20 Homeland Security to execute his removal order.<sup>15</sup> Moreover, Mr.  
21 Patel is not claiming that the Secretary should grant him  
22 discretionary, deferred-action-type relief. That is, he is not asking  
23 the Secretary of Homeland Security to exercise her discretion to  
24 allow him to remain in the United States. The fact that Mr. Patel in



1 his petition seeks a stay of removal does not make his claim one  
2 against the decision to execute a removal order. The substance of  
3 his claim is that the USCIS has unduly delayed a decision on his  
4 and his wife's applications for adjustment of status, and her  
5 petition for immigrant worker. Whether or not the Secretary of  
6 Homeland Security executes a removal order against Mr. Patel is  
7 immaterial to the substance of this claim, except to the extent that  
8 the execution of that order will render it moot.  
9  
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13 Accordingly, 8 U.S.C. § 1252(g) is no bar to this Court staying  
14 Mr. Patel's removal during the pendency of this action.  
15

16 B. THE COURT HAS JURISDICTION OVER THIS ACTION  
17 DESPITE 8 U.S.C. § 1252(a)(2)(B)  
18

19 Mr. Patel is unaware of any basis for questioning this Court's  
20 jurisdiction to require USCIS to adjudicate the petition for  
21 immigrant worker filed upon Mrs. Patel's behalf by her employer,  
22 which has been pending with the NSC for over 4 ½ years, even  
23 though it claims to be adjudicating such petitions within 4  
24  
25

1 months.<sup>16</sup> However, some Courts have found actions to compel  
 2 adjudication of applications for adjustment of status to be barred  
 3 under 8 U.S.C. § 1252(a)(2)(B). *E.g. Safadi v. Howard*, 466  
 4 F.Supp.2d 696, 698 (E.D.Va.2006); *Grinberg v. Swacina*, 478  
 5 F.Supp.2d 1350 (S.D.Fla.2007); *Li v. Chertoff* 482 F.Supp.2d 1172  
 6 (S.D.Cal.2007); *Qiu v. Chertoff*, 486 F.Supp.2d 412 (D.N.J.,2007);  
 7 *Sharif v. Chertoff*, No. 07 C 1690, 2007 WL 2045489 (N.D.Ill. Jul 18,  
 8 2007); *Narra v. Gonzalez*, No. 4:06CV3289, 2007 WL 1959255  
 9 (D.Neb. July 3, 2007); *Zhang v. Dist. Dir.*, USCIS, No. 07-362(SDW),  
 10 2007 WL 1797655, (D.N.J. June 20, 2007); *Elzerw v. Mueller*, No.  
 11 07-00166,2007 WL 1221195 (E.D.Pa. Apr. 23, 2007); *Romanovich v.*  
 12 *Gonzales*, No. 07-60224, 2007 WL 1229047 (S.D.Fla. April 4, 2007);  
 13 *Zaytsev v. Gantner*, No.4 civ 7101, 2004 WL 2251665 (S.D.N.Y.  
 14 Sept.24, 2004).

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 21 <sup>16</sup> Mrs. Patel, as the beneficiary of this petition, whose application for  
 22 adjustment of status has been delayed awaiting its adjudication, has standing  
 23 to sue for a prompt decision on the petition. *See Bangura v. Hansen*, 434 F.3d  
 24 487, 500 (6<sup>th</sup> Cir. 2006)(beneficiary of alien relativ has standing to seek review  
 25 of its denial in Federal Court), *Ghaly v. INS*, 48 F.3d 1426, 1434 n. 6 (7<sup>th</sup>  
 Cir.1995) (holding that immigrant beneficiary of an employer's visa application  
 fell within the visa statute's "zone of interest," and thus, had standing to  
 challenge the visa's revocation under the APA); *Taneja v. Smith*, 795 F.2d 355,  
 358 n. 7 (4<sup>th</sup> Cir.1986) (same).

1  
2 However, whatever the merits of this argument may be in  
3 other jurisdictions, it is plainly foreclosed in the 6<sup>th</sup> Circuit in light  
4 of our Court of Appeals' recent decision narrowly construing 8  
5 U.S.C. § 1252(a)(2)(B) to apply only to discretionary decisions:  
6  
7

8 [A]s the heading of the underlying provision suggests, see *id.* §  
9 1252(a)(2)(B) ("Denials of discretionary relief"), the statute  
10 prevents us from reexamining only discretionary decisions by  
11 the agency, including discretionary denials of an application  
12 for cancellation of removal. "[N]on-discretionary decisions," by  
13 contrast, are within our purview, even where they "underlie  
14 determinations that are ultimately discretionary." *Billeke-*  
15 *Tolosa v. Ashcroft*, 385 F.3d 708, 711 (6th Cir. 2004); see also  
16 *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir.  
17 2005) (holding that § 1252(a)(2)(B) "divests jurisdiction of a  
18 court to review judgments regarding the granting of  
19 discretionary relief, including the cancellation of removal," but  
20 does not remove jurisdiction to review the non-discretionary  
21 fact of an alien's continuous presence in the United States).

22 *Aburto-Rocha v. Mukasey*, 535 F.3d 500, 502 (6<sup>th</sup> Cir. 2008).

23 Even though it is within the discretion of the Secretary of  
24 Homeland Security as to how she will decide an application for  
25 adjustment of status, she certainly has no discretion not to decide it  
all. Here 8 U.S.C. § 1255(a) provides that:

1 The status of an alien who was inspected and admitted or  
2 paroled into the United States or the status of any other alien  
3 having an approved petition for classification as a VAWA self-  
4 petitioner may be adjusted by the Attorney General, in his  
discretion and under such regulations as he may prescribe, to

5 that of an alien lawfully admitted for permanent residence if  
6 (1) the alien makes an application for such adjustment,  
7 (2) the alien is eligible to receive an immigrant visa and is  
8 admissible to the United States for permanent residence, and  
9 (3) an immigrant visa is immediately available to him at the  
time his application is filed.

10 Thus there is no statutory language authorizing the Secretary  
11 of Homeland Security to shelve an application for adjustment of  
12 status and pay it no mind whatsoever. The statute states simply  
13 that the Secretary may deny or grant an application for reasons  
14 within her discretion. In fact, 8 U.S.C § 1103 states that "[t]he  
15 Attorney General shall be charged with the administration and  
16 enforcement of this chapter and all other laws relating to the  
17 immigration and naturalization of aliens." which certainly requires  
18 that the Secretary of Homeland Security act upon applications for  
19 adjustment of status which are properly filed under the Act, since  
20 this is a duty inherent in the administration and enforcement of  
21 immigration laws.  
22  
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2 Likewise, the Code of Federal Regulations provide that "the  
3 applicant shall be notified of the decision of the director (on his  
4 application for adjustment of status), and, if the application is  
5 denied, the reasons for the denial." 8 C.F.R. § 245.2 (parenthetical  
6 material added for clarity). In other words, the statutes and the  
7 regulation provide that certain actions shall be taken by the  
8 Secretary even if the ultimate determination of how she will act is  
9 committed to her discretion. Accordingly, regardless of her ultimate  
10 decision, the Secretary of Homeland Security has a  
11 nondiscretionary duty to act on applications for adjustment of  
12 status. *Yu v. Brown*, 36 F. Supp. 2d 922, 931 (D.N.M. 1999),  
13 *Alsharqawi v. Gonzales*, 2007 U.S. Dist. LEXIS 29808 (D. Tex.  
14 2007).

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19  
20 Yet by ignoring Mr. Patel's application for adjustment of status  
21 until he is removed from the country (by the Secretary herself) the  
22 Secretary of Homeland Security is in effect deciding to not  
23 adjudicate his application for adjustment of status. This is not a  
24  
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1 decision she has the discretion to make and therefore it is one  
2 reviewable by this Court under *Aburto-Rocha*, regardless of 8 U.S.C.  
3 § 1252(a)(2)(B). *See also, e.g. Nigmadzhanov v. Mueller*, 550  
4 F.Supp.2d 540 (S.D.N.Y.2008) (finding subject matter jurisdiction to  
5 order mandamus pertaining to applications of adjustment of  
6 status); *Kashkool v. Chertoff*, 553 F.Supp.2d 1131 (D.Ariz.2008)  
7 (same); *Bondarenko v. Chertoff*, No. 07-mc-00002, 2007 WL  
8 2693642, 2007 U.S. Dist. LEXIS 67143 (W.D.N.Y. Sept. 11, 2007)  
9 (same); *Koren v. Chertoff*, No. 3:07cv157 (PCD), 2007 WL 1431948,  
10 2007 U.S. Dist. LEXIS 35128 (D.Conn. May 14, 2007) (same);  
11 *Zaigang Liu v. Novak*, 509 F.Supp.2d 1 (D.D.C.2007) (same); *Shah v.*  
12 *Hansen*, No. 1:07 CV 1576, 2007 WL 3232353, 2007 U.S. Dist.  
13 LEXIS 80636 (N.D.Ohio 2007) (same); *Belegradek v. Gonzales*, 523  
14 F.Supp.2d 1364 (N.D.Ga.2007) (same); *Toor v. Still*, No. C07-0645  
15 BZ, 2007 WL 2028407, 2007 U.S. Dist. LEXIS 53173 (N.D.Cal. July  
16 10, 2007) (same); *Ma v. Gonzales*, No. C07-122RSL, 2007 WL  
17 1655188, 2007 U.S. Dist. LEXIS 41103 (W.D. Wash. June 5, 2007).

### 23 CONCLUSION

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MOTION FOR TEMPORARY ORDER STAYING  
THE REMOVAL OF HARSHADBHAI PATEL - 22

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1 This Court needs to act immediately to stay Harshadbhai  
 2 Patel's removal from the United States if it is even to have the  
 3 opportunity to review his claim that his application for adjustment  
 4 of status, and the petition for immigrant worker and application for  
 5 adjustment of status of his wife, have been unduly delayed. Since  
 6 Mr. Patel is likely to prevail on the merits of his complaint, and will  
 7 suffer irreparable harm if he is removed (in that his claim will be  
 8 mooted by his removal), while the government will suffer little or no  
 9 detriment by staying his removal, it is respectfully requested that  
 10 this Court issue a Temporary Restraining Order staying Mr. Patel's  
 11 removal during the pendency of this action or, in the alternative,  
 12 until a hearing can be held on a preliminary injunction.  
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 17

18 Respectfully submitted,

19 Dated this 30th day of July, 2009

20 s/Michael E. Piston  
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MOTION FOR TEMPORARY ORDER STAYING  
 THE REMOVAL OF HARSHADBHAI PATEL - 23

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**CERTIFICATE OF SERVICE**

I, Michael E. Piston, hereby certify that I served a true and accurate copy of the attached Motion for Temporary Restraining Order Staying the Removal of Harshadbhai Patel via postage paid first class certified mail/return receipt requested to:

Janet Napolitano, Secretary  
Department of Homeland Security  
Washington, DC 20528

Michael Aytes, Acting Deputy Director  
U.S. Citizenship & Immigration Services  
20 Massachusetts Avenue, N.W.  
Washington, DC 20529

F. Gerard Heinauer, Director  
U.S. Citizenship & Immigration Services  
Nebraska Service Center  
950 S Street  
Lincoln, NE 68508

Vincent Clausen, Director  
Immigration & Customs Enforcement  
Detroit District  
333 Mount Elliott Street, 2<sup>nd</sup> Floor  
Detroit, MI 48207



1 U.S. Attorney  
2 211 West Fort Street, Suite 2001  
3 Detroit, MI 48226

4 U.S. Attorney General  
5 U.S. Department of Justice  
6 950 Pennsylvania Avenue, N.W.  
7 Washington, D.C. 20530-0001

8 on this 30<sup>th</sup> day of July, 2009.  
9

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